IN THE

Supreme Court of the United States

October Term, 1976

No. 76-319

ALBERT P. MICKUNAS,

Petitioner,

vs.

ROGERS C. B. MORTON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 7, 1976.

Order Below.

The order is of the Court of Appeals for the Ninth Circuit and was entered on June 7, 1976. The order, which denied petitioner's request for a rehearing appears in the Appendix. It is this order of which review is sought.

Jurisdiction.

The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Question Presented.

Where the neglect of the Federal District Court Clerk prevents the appellant in an action before the Court of Appeals from making a timely filing of a complete record on appeal and brief on appeal, as required in Rules 10 and 31 of the *Federal Rules of Appellate Procedure,* may the action be properly dismissed?

Statement of the Case.

Pursuant to a successful lottery application, the petitioner herein was granted a lease for the extraction of gas and oil from certain public lands in California. Despite the acceptance of petitioner's rental checks, and despite the lack of a hearing required by Regulations 43 CFR §3101.1 (6) and 43 CFR §3101.1-2 (b), the petitioner was notified by Walter F. Holmes of the Bureau of Land Management (BLM) that his lease offer had been rejected.

After exhausting possible appeals through the Department of the Interior, the petitioner filed suit in the United States District Court, Central District of California (CV. No. 74-1820-WPG). Petitioner's complaint was that he had been deprived of his rights to due process of law, as guaranteed in the Fifth Amendment of the Constitution of the United States, and the protections of the Mineral Leasing Act (MLA) of February 25, 1920, as amended, 41 Stat. 437, 30 U.S.C. §181, *et seq.;* his plea was for equitable and declaratory relief as provided in the Declaratory Judgment Act,

28 U.S.C. §§2201, 2202. On September 30, 1974, the court entered summary judgment against the petitioner.

The petitioner immediately filed a Notice of Appeal, a Notice of Request for Reporter's Transcript for Hearing on September 30, 1974 for Use on Appeal, and a Plaintiff's Designation of the Record on Appeal. All the foregoing was to no avail as the Reporter's Transcript was never received by petitioner, or filed with the Court. The appeal was dismissed on May 14, 1976. At the time of filing of petitioner's Petition for Rehearing on May 25, 1976, the Reporter's Transcript had still not been received despite payment for it in full by the petitioner.

The filing of the reporter's transcript is essential for the record on appeal to be complete, which in turn is a prerequisite for the filing of briefs on appeal, Federal Rules of Appellate Procedure 10 (a) and 31 (a). Due to the capricious whimsy of the mails, and the bureaucracy, the petitioner has been denied right and proper access to a just and equitable resolution.

REASONS FOR GRANTING THE WRIT.

1. Damage to the Petitioner Mickunas is real, grievous, and immediate. The petitioner has been injured financially in great degree as a direct result of Bureau of Land Managements' unjustified and improper action. Petitioner contends, furthermore, his rights under the Fifth Amendment of the Constitution of the United States have been abridged, by said Bureau's failure to hold a hearing as required. (Petitioner does not come before this Court to contest the constitutional propriety of said Bureau's behavior, being, rather, of the opinion that when this Court approves his plea for a rehearing, the constitutional impropriety will be clearly documented at further proceedings).

2. The question presented appears to be a novel one in this or any other appellate court.

A bureaucratic malfunction totally outside Petitioner's control has deprived him of the essential Reporter's Transcript. Without said Transcript on file, the Ninth Circuit Court of Appeals issued an Order of dismissal. In a "Catch 22" scenario, petitioner has been deprived of a decision on the merits of his plea. Never, to the best of petitioner's knowledge, has such a dilemma been discussed by any appellate court.

In granting certiorari, this Court would make a needed affirmative statement that the decisions of law and justice in these United States will not be dependent on bureaucratic error.

3. The proceedings have thus far departed from the acceptable and usual course as to call for an exercise of this Court's power of supervision. Were the lower court's decision allowed to stand, it would

represent a dangerous incursion of caprice and administrative whimsy into the conduct of their duly designated judicial functions by the courts of the United States.

4. Although Rule 10 of the *Federal Rules of Appellate Procedure* allows substitution of an appellant's statement (10c), or an agreed statement of the adverse parties (10d), for the original transcript of proceedings in composing the record on appeal, such substitutions would be inadequate for the case before the Court. In a case as complex and potentially significant as the present action, a full transcript is essential to proceedings on appeal.

The decision of the Eighth Circuit in *St. Paul Fire & Marine Insurance Co. v. Arkla Chemical Corp.*, 431 F.2d 959 (1970) held that as the appellants therein had not attempted to use the alternatives provided in Rule 10 (c) and (d) for completion of the record on appeal, their motion for an extension of time to file an appendix and brief was to be denied. The facts of that case are not in point, but the opinion of the court clearly acknowledges that in certain cases the transcript is essential to the record on appeal.

Petitioner herein respectfully submits that the extent of complex scientific, technical, and legal information which an equitable resolution of the action would require is such that an official transcript would be of crucial importance on appeal. Furthermore, the issue regarding the due process of law, and the Bureau of Land Managements' default therein, is of such importance that an exact transcript becomes an even greater necessity.

5. Should the Court refuse to grant certiorari, virtual sanction would be given to the alleged unconstitu-

tional behavior of the Bureau of Land Management and the Department of the Interior. The only possible remedy that the petitioner might have would be to attempt a second lawsuit. Assuming that the statute of limitations has not expired, the multiple litigation would be both prohibitive in cost and would further add to the burden of caseload currently upon the courts. This Court should grant certiorari, petitioner respectfully submits, so that constitutional rights, and integrity and judicial economy can be upheld.

Review by this Court of the order from the Court of Appeals appears to be the simplest, most logical, consistent and flexible remedy for the dispute at hand. It may indeed offer the only remedy.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

RICHARD R. CLEMENTS,
Attorney for Petitioner.

APPENDIX.

Statutes and Regulations.

(A) UNITED STATES CODE

1. 28 U.S.C. §1254 (1) states that:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

2. 28 U.S.C. §2201 states that:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

3. 28 U.S.C. §2202 states that:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

4. 30 U.S.C. §181 states in relevant part that:

"Deposits of . . . oil, oil shale . . . and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the oil is mined or quarried) or gas, and lands containing such deposits owned

by the United States, . . . but excluding . . . lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States . . ."

(B) FEDERAL RULES OF APPELLATE PROCEDURE

1. Rule 10 of the *Federal Rules of Appellate Procedure* states in relevant part that:

(a) "The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."

(c) ". . . if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

(d) "In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved

or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, . . . shall then be certified to the court of appeals as the record on appeal . . ."

2. Rule 31 of the *Federal Rules of Appellate Procedure* states in relevant part that:

(a) "The appellant shall serve and file his brief within 40 days after the date on which the record is filed . . ."

(c) "If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal . . ."

(C) FEDERAL REGULATIONS

1. 43 C.F.R. §3101.1-1 (6) states in relevant part that:

"All lands subject to disposition under the act which are known or believed to contain oil or gas may be leased by the Secretary of the Interior. . . .

Exceptions: . . . lands within one mile of naval petroleum or helium reserves. No oil and gas lease will be issued for land within one mile of the exterior boundaries of a naval petroleum or helium reserve, unless the land is being drained of its oil or gas deposits or helium content by wells on privately owned land or unless it is determined by the authorized officer, after consultation with the agency exercising jurisdiction over the reserve, that operations under such a lease will not adversely affect the reserve through drainage from known productive horizons."

2. 43 C.F.R. §3101-1-2 (b) states that:

"Should the land be found to be prospectfully valuable for oil or gas, the entryman or settler will be notified thereof and allowed a reasonable time to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for a hearing in the event that reclassification is denied, or to appeal. If he does neither, or he is unsuccessful, the entry or settlement rights and patent issued pursuant thereto will be impressed with a reservation of oil and gas to the United States. In such circumstances a lease will be granted to the offeror, all else being regular, unless the entryman or settler has a preference right.

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THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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Washington, D.C. 20530.

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Petitioner contends that the court of appeals erred in dismissing his appeal for failure to prosecute.

1. In 1972, petitioner filed with the Department of the Interior an offer to lease public lands located within one mile of the Naval Petroleum Reserve No. 1 (Elk Hills), in Kern County, California, for the extraction of oil and gas. On December 8, 1972, the Office of the Bureau of Land Management rejected the offer, stating that "[b]ased on geological information presently available relating to the area under consideration, it is not possible to state that operations under such a lease will not adversely affect the adjacent Naval Petroleum Reserves through drainage from productive oil and gas horizons." The Bureau noted that "any action which will increase the likelihood of drainage from the deposits believed to exist in the formations underlying the Reserves [would

be] inconsistent with the laws requiring the maintenance of the Reserves for production in an emergency, 43 CFR 3101.1-1." This decision was affirmed on August 22, 1973, by the Interior Board of Land Appeals (12 IBLA 275), which denied a petition for reconsideration on November 27, 1973.

Seven months later, on June 28, 1974, petitioner instituted this action in the United States District Court for the Central District of California to challenge the administrative determination. On September 30, 1974, the court granted the government's motion to dismiss the complaint on the ground that the action was barred by the 90-day limitation period of 30 U.S.C. 226-2 (Pet. App. 5).[1] Petitioner filed a timely notice of appeal from this judgment on November 27, 1974, and designated the record on appeal. The designation made no reference to the eight-page reporter's transcript of the proceedings held on September 30, 1974. On December 5, 1974, the government counter-designated the record on appeal, requesting inclusion of the September 30 transcript. On April 11, 1975, the district court forwarded the record, including the transcript, to the clerk of the court of appeals, and on December 12, 1975, following delays caused by petitioner's failure to pay docketing fees properly or to move for an extension of time in which to file the record, the court of appeals forwarded copies of the record, excluding the transcript, to the parties.[2]

[1]Section 42 of the Mineral Leasing Act, as added, 74 Stat. 790, 30 U.S.C. 226-2, provides: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

[2]Rule 4(f) of the Rules of the United States Court of Appeals for the Ninth Circuit provides that the transcript of proceedings is not included as part of the duplicated record transmitted to the parties and must be obtained from the reporter.

Following the docketing of the record, petitioner neither filed his brief on appeal within the 40-day limit of Rule 31(a), Fed. R. App. P., nor sought an extension of time in which to file the brief, as required by Rule 26(b), Fed. R. App. P. On April 2, 1976, the government moved pursuant to Rule 31(c), Fed. R. App. P., to dismiss the appeal for failure to prosecute. After receiving petitioner's opposition to the motion, the court dismissed the appeal on May 14, 1976 (Pet. App. 7), and denied a petition for rehearing on June 3, 1976 (*ibid.*).

2. In view of petitioner's failure to file his brief within the time limits provided by the appellate rules or to request an extension of time to do so, despite the passage of more than three months from the time the brief was due, the court of appeals properly dismissed petitioner's appeal. See Rule 31(c), Fed. R. App. P.; *Jackson* v. *Hensley*, 484 F. 2d 992 (C.A. 5); *United States* v. *Lynch*, 419 F. 2d 386 (C.A. 4); *Hawke* v. *McKee*, 391 F. 2d 262 (C.A. 5). Contrary to petitioner's assertions (Pet. 3), his tardiness cannot be explained by his alleged inability to obtain a copy of the September 30, 1974, transcript. This transcript was not ordered by petitioner or designated by him pursuant to Rule 10(b), Fed. R. App. P. In addition, the transcript was transmitted to the court of appeals on April 11, 1975, and would presumably have been available to petitioner at that time if he had exercised normal diligence.

In any event, since the only issue decided by the district court was the legal question whether this action was barred by the statute of limitations, it is apparent that the eight-page transcript of oral argument on the government's summary judgment motion was unnecessary to the preparation of petitioner's brief and that the resolution of petitioner's appeal did not require access to any "complex scientific, technical, and legal information" (Pet. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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